No. 86-1720 (7)

In the Supreme Court of the United States

OCTOBER TERM, 1986

RUBEN TREVINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1720

RUBEN TREVINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals misapplied the clearly-erroneous standard of appellate review in reversing and modifying the district court's award of economic and non-economic damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*

1. Petitioners brought this action under the FTCA in the United States District Court for the Western District of Washington, alleging that they and their daughter, Sophia, had been injured by negligent obstetrical care provided at the Madigan Army Medical Center in Tacoma, Washington. Specifically, petitioners asserted that government doctors had negligently failed to diagnose and to treat appropriately

an abnormality in petitioner Rachel Trevino's pregnancy that ultimately caused her infant daughter Sophia to suffer serious physical and mental impairments at birth. Petitioners sued on their own behalf and as legal guardians for Sophia.

The district court held that the United States had been negligent under the applicable standards of the law of Washington and that the negligence proximately caused Sophia to sustain mental retardation, cerebral palsy, and other serious injuries. The court awarded petitioners a total of $6.3 million in economic and non-economic damages. The award consisted of $2 million in non-economic damages for Sophia, $400,000 in non-economic damages for Sophia's parents (for loss of love and companionship and for injury to the parent-child relationship), and approximately $3.9 million in economic damages for Sophia's lost earnings and medical care. In calculating the economic damages, the district court used a rate of negative two percent in discounting future losses to present value. Pet. App. 3-19.

2. On appeal, the government did not contest liability but challenged several aspects of the district court's award of damages. The court of appeals reversed in part and modified in part. Applying a clearly-erroneous standard of review,[1] the court reduced the awards of non-economic damages as ex-

---

[1] The court of appeals noted that FTCA damage awards are reviewed for clear error and explained that a damage award is clearly erroneous if "after a review of the record, [the reviewing court is] 'left with the definite and firm conviction that a mistake has been committed' " (Pet. App. 22 (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948), and citing *Shaw* v. *United States*, 741 F.2d 1202, 1205 (9th Cir. 1984)).

cessive, eliminated a part of the economic damage award as clearly erroneous, and remanded for reconsideration of the appropriate discount rate (Pet. App. 36).

With respect to the non-economic damage awards, the court of appeals explained that excessiveness is a question of Washington state law and that Washington considers such awards excessive if the amount shocks the court's sense of justice or sound judgment and it appears that the trial judge was swayed by passion or prejudice (Pet. App. 22-23). The court pointed out that Sophia Trevino "will be able to attain a fourth-grade reading and writing level, * * * will be able to work during her adult life, * * * has been described as 'a delightful little child who obviously expects to be responded to positively by others,' * * * [and] is 'imaginative in her play'" (*id.* at 24 (citations omitted)). The court then noted that, in *Shaw* v. *United States*, 741 F.2d 1202 (1984), a recent case applying Washington law and involving a child more severely impaired than Sophia Trevino, the Ninth Circuit had reduced the non-economic damages to $1 million for the child and to $50,000 for the child's parents for the same types of non-economic damages sought by Sophia's parents, who "will be able to enjoy her company to a far greater degree than would" the parents in *Shaw*. Pet. App. 23-25. The court reduced Sophia's non-economic damage award from $2 million to $1 million and reduced her parents' award from $400,000 to $100,000 (*ibid.*).

With respect to the economic damage award, the court first reversed the award of approximately $1.8 million for the life-time services of a home attendant. Petitioners offered the testimony of an expert witness in support of the need for such care, but the testi-

mony of petitioners' expert "was spotty at best; her examination of Sophia was cursory; her conclusions were not well-founded" (Pet. App. 26). By contrast, the government's expert on the issue, the Director of Training and Nursing for the University of Kansas's Children's Rehabilitation Unit, had evaluated between 700 and 1,000 handicapped children and soundly based her testimony on observation and evaluation of Sophia (*id.* at 26-27). After noting that the government's expert had testified that attendant care could actually harm Sophia by fostering dependence, the court concluded that the district court's provision for attendant care was wholly unsupported by the record. The court therefore eliminated the award in its entirety (*id.* at 27).

The court next held that the district court abused its discretion in choosing a negative two percent discount rate for determining the present value of future economic damages—a choice based on the assumption that, on average, inflation would exceed reasonable investment returns by that amount (Pet. App. 27, 32-33). First, the district court projected future inflation from a time period that was too short and gave undue weight to recent periods of unusually high inflation (*id.* at 29-31). Second, the district court used the rate of wage growth as a measure of inflation; but wage growth reflects both inflation and increases in worker productivity, and there was no evidence at all supporting compensation for increasing productivity in this case (*id.* at 31-32). Finally, the discount rate may have been distorted by the district court's reliance on the low interest rate yielded by tax-free securities, which would not be the sole investment made by a prudent investor (*id.* at 34).

For those reasons, the court remanded the case to the district court for recalculation of the present value of economic damages (Pet. App. 36). The court of appeals subsequently denied requests for panel and en banc rehearing (*id.* at 37).

3. The fact-bound decision of the court of appeals is correct and is wholly in accord with the decisions of this Court and of other courts of appeals. Review by this Court is plainly unwarranted.

a. Petitioner first suggests (Pet. 4-8) that the court of appeals departed from the clearly-erroneous standard of appellate review and that disparities in results of various appellate courts' review of damage awards require this Court's attention. Putting to one side petitioners' particular allegations of error (which, as shown below, are without merit), these general contentions are patently meritless.

Application of the clearly-erroneous standard of review hardly forbids (indeed, it would seem to require) a court of appeals to examine the record carefully to determine whether the evidence as a whole leaves the firm conviction that the district court's findings of fact were wrong. *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Contrary to petitioners' accusation of transcript "editing" (Pet. 5), the court of appeals in this case properly reviewed the evidence and reversed findings of fact only where, for the reasons it set forth, it was left with the definite impression that the trial court had erred. Moreover, there is no problem of inter-circuit or intra-circuit disparity in appellate review that calls for this Court's intervention. All of the cases cited by petitioners endorse the same standard of review, and all agree that the adequacy or exces-

siveness of damages in an FTCA action is determined by applicable state law. See, *e.g.*, *Jastremski* v. *United States*, 737 F.2d 666, 672 (7th Cir. 1984). Among decisions arising under the law of Washington, which applies here, petitioners have wholly failed to show any disparities between comparable cases; and indeed, the court of appeals' reliance on its recent *Shaw* decision was plainly correct. In any event, review by this Court on a question of Washington law is unwarranted.

b. Petitioners challenge (Pet. 9-15) the court of appeals' reduction of the non-economic damage awards on the grounds that the court failed to account for Sophia Trevino's long life expectancy and that the court's ruling is inconsistent with certain comparable decisions under Washington law. These challenges are without merit.

The court of appeals, recognizing the intangible nature of pain, suffering, and other non-pecuniary injuries, followed the proper course in reviewing the award of non-economic damages. It first examined the totality of circumstances that will determine, over time, Sophia's quality of life, her capacity for social interaction, and the effects on her parents of her injuries; it then compared the awards at issue here to the damage award in the most recent case under Washington law involving comparable facts, namely, the *Shaw* case (Pet. App. 23-25).[2] There is no basis

---

[2] Washington law permits damages for mental anguish, pain and suffering, and the loss of a capacity to lead a normal life: It also permits the parents of an injured child to recover non-economic damages for loss of companionship, loss of the child's mutual society and protection, and grief, mental anguish, and suffering. See Pet. App. 23-25; *Parris* v. *Johnson*, 3 Wash. App. 853, 860 n.2, 479 P.2d 91, 95 n.2 (1970); *Hinzman* v. *Palmanteer*, 81 Wash. 2d 327, 501 P.2d 1228 (1972).

for petitioners' contention that the court ignored that fact, which was plainly set out among the district court's findings of fact (Pet. App. 15) and which, as the district court's findings show (*id.* at 14, 15, 17), is not, in any event, the sole or even dominant determinant of non-economic losses. Moreover, although Sophia Trevino's injuries were actually less severe than those suffered by the child in the *Shaw* case (though Sophia's life expectancy was somewhat longer), the court of appeals in this case awarded the same non-economic damages to Sophia as it had awarded to the *Shaw* child ($1 million) and greater non-economic damages to Sophia's parents than it had awarded in *Shaw* ($100,000 here; $50,000 in *Shaw*).

Similarly, petitioners have not shown that the court of appeals erred in relying on *Shaw* rather than the two decisions they point to (Pet. 13-14). Petitioners have wholly failed to show that those decisions present facts closer to those here than does the *Shaw* decision. In any event, the figures petitioners give for the damage awards in *Thompson* v. *Community Memorial Hospital, Inc.*, No. 81-2-16549-4 (Wash. Super. Ct. 1985), are figures for a jury award that included both economic and non-economic damages and that was not reviewed for excessiveness (because the case settled). See U.S. Br. App. 8a in the Ninth Circuit in this case. And in *Dearing* v. *United States*, No. C-82-654-SPM (E.D. Wash. May 12, 1986), appeal pending on other grounds, No. 86-4232 (9th Cir.), the district court award of $1,250,000 for non-economic damages is not nearly as shocking to the sense of justice or indicative of a finder of fact " 'swayed by passion' " (Pet. App. 22 (quoting *Shaw*, 741 F.2d at 1209)) as the $2 million award by the district court here.

c. Contrary to petitioners' next contention (Pet. 15-22), the court of appeals, in overturning the damage award for attendant care, neither failed to review all the evidence nor improperly substituted its judgment for that of the trial court. The need for lifetime attendant care turned on a dispute between petitioners' expert and the government's expert. The court of appeals properly concluded that the relatively poor qualifications of petitioners' expert and her "cursory" examination of Sophia Trevino must severely diminish the evidentiary weight of her testimony (Pet. App. 26). The government's evidence, the testimony of a witness with manifestly superior qualifications, training, education, and experience,[3] showed that attendant care would be an impediment to Sophia's gaining maximum possible independence and necessarily carried more weight. "Viewing the record as a whole" (*ibid.*), the court of appeals correctly concluded that the district court's finding of a need for attendant care was clearly erroneous.

d. Finally, petitioners' challenge (Pet. 22-28) to the court of appeals' rejection of the district court's choice of a negative two percent discount rate is likewise meritless. Consistent with *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523 (1983), and *Culver* v. *Slater Boat Co.*, 722 F.2d 114, 121-122 (5th Cir. 1983) (en banc), the court of appeals left the district court leeway to choose among several acceptable methods in discounting future losses to pres-

[3] Plaintiff's expert had little experience in nursing patients with cerebral palsy or developmental disabilities and no special training in that field (II Tr. 108-110). The government's expert had a graduate degree in nursing, over ten years of experience in children's rehabilitation, and had performed over 700 evaluations of handicapped children (IV Tr. 43-45).

ent value; the court also admitted the possibility of a negative discount rate where supported by credible expert testimony, and held only that it could not "embrace a negative discount rate on the basis of *this* record" (Pet. App. 32-33 (emphasis added)). In particular, the court of appeals correctly concluded, among other things, that the district court had no evidentiary basis for taking worker-productivity increases into account in this case and had not adequately justified its use of the period 1954-1984, which was unusually inflationary when seen from a longer perspective, in projecting the future "net" interest rate (the market interest rate minus inflation). Moreover, in finding the district court's selection of a negative two percent discount rate inadequately supported by evidence, the court correctly relied on the fact that that rate fell well outside the range of one to three percent that this Court, after an exhaustive review of the economic literature, found to be generally supported by sound economic evidence in *Jones & Laughlin Steel Corp.*, 462 U.S. at 548-549. The court of appeals' remand for new evidence does not warrant this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JUNE 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181493 40381